Supreme Court, U.S.
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Supreme Court of the United States

Term 1958

No. 781

SELECT THEATRES CORPORATION,

Petitioner,

—against—

JAMES W. JOHNSON, COLLECTOR OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner-in-the above case prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of that court, and as its petition sets forth the following:

1. The per curiam opinion (copy appended hereto) of the Court of Appeals for the Second Circuit is not yet reported. The opinion of Judge Alexander Bicks of the United States District Court for the Southern District of New York, which was affirmed by the Court of Appeals, is reported in 145 Fed. Supp. 583.

2. The judgment sought to be reviewed is dated and was entered by the court below on December 3, 1957.

3. There was no order at any time made respecting a rehearing; nor was there any order granting an extension of time within which to petition for certiorari.

4. The jurisdiction of this court is sought to be invoked under Sections 1254(1) and 2101(c) of the Judicial Code (28 U. S. C.).

5. The question presented for review is as follows:

> "For the purpose of computing its fiscal year 1943 excess profits tax credit based on the invested capital method, did a tax free reorganization take place with respect to the assets Petitioner acquired from its predecessor, the Shubert Theatre Corporation, so as to entitle Petitioner to use the cost basis of the assets as they were in the hands of its aforementioned predecessor, adjusted within the purview of Section 760 of the 1939 Internal Revenue Code as amended, * * * "

6. Attached as part of the appendix hereto are the following sections of statutes which the case involves:

(a) Section 112(i) Revenue Act of 1932;

(b) Section 113(a)(7) Revenue Act of 1932;

(c) Section 113(a)(7)(A) Internal Revenue Code 1939 as amended;

(d) Section 113(a)(12) Internal Revenue Code 1939 as amended;

(e) Section 718(a)(1) and (2) Internal Revenue Code 1939 as amended;

(f) Section 760 Internal Revenue Code 1939 as amended.

7. Statement of facts material to case:

The Shubert Theatre Corporation, hereinafter referred to as the "Old Corporation," profitably operated in the legitimate theatre business for many years. Beginning in

1929, however, its business started to decline as the economic condition of the country became worse. In October 1931 it consented to the appointment of a receiver in an equity receivership proceeding brought against it by unsecured creditors in the United States District Court for the Southern District of New York. Lee Shubert and the Irving Trust Company were appointed the receivers. At that time the old corporation assets which had a book value of approximately $20,000,000, which were subject to various liens of mortgages, real estate taxes and the like of about $10,000,000. It also had outstanding unsecured liabilities consisting of unsecured debentures, unsecured notes, accounts payable and the like totalling approximately $8,000,000. There were also 210,300 shares of capital stock outstanding.

The business continued to operate in the hands of the receivers. Various creditor and stockholder committees were formed.

After concluding that if a liquidation of the business took place, a dividend of only 4% or less might be received by the $8,000,000 of unsecured creditors, a plan for the continuation of the business with a view to a possible reorganization was proposed by Lee Shubert, submitted to the court and thereafter adopted; and to this plan either all the creditors consented or did not object. The plan among other things provided for the receiver borrowing $300,000 based on receivers' certificates which would be a lien on all of the assets of the business and be made prior in right over and above the unsecured creditors. As part of the plan which was offered, it was specifically pointed out as follows:

> "from the very nature of the enterprise however, especially in the present general business condition, and because the plan involved the borrowing of a relatively

large sum of money, the proposal is hazardous and it may result in the holders of the receivers' certificates of indebtedness automatically coming into possession of all of the residue of the property, without the payment of any dividend to general creditors. The Committees and other representatives of creditors who have expressed their approval of continuation of the business have been advised of these considerations."

All of the receivers' certificates were sold by the receivers between June 1932 and October 1932 to the Atel Company, Inc., a corporation hereinafter referred to as "Atel." All of the capital stock of Atel was owned by Dorsar Enterprises, Inc., a corporation hereinafter referred to as "Dorsar" which was owned 100% by a partnership of which Lee and J. J. Shubert were the sole co-partners, fifty-fifty. The funds employed by Atel for the purpose of purchasing the receivers' certificates came to it by loan from Dorsar, which in turn had the money advanced to it by the Shubert co-partnership.

All the monies borrowed on the receivers' certificates were used in the business. However, conditions went from bad to worse with the result that in January 1933 after hearings were held, an order was made by the court directing the sale at public auction of all the assets. An upset price of $400,000 was fixed by the Court, to cover the outstanding receivers' certificates, plus administration expenses. The order of sale also permitted the receivers' certificates to be credited against the purchase price to the extent that the Court did not require the bid price to be paid in cash.

Some efforts had been made without success to reorganize the business. Prior to the Old Corporation going into receivership, two different plans of readjustment of

its capital structure had been sought to be made but without success. In late 1932 a reorganization committee was formed. In February 1933 a reorganization plan was promulgated by the Committee but this proposed plan had to be abandoned two days before the sale of the assets which took place on April 7, 1933 because of lack of necessary subscriptions. This plan of reorganization would have placed the receivers' certificate holders in a priority position in the proposed reorganization company and gave them preferred stock as well as common stock.* A statement made by the reorganization committee in said plan said

> "* * * and it is questionable whether the properties and assets in the possession of the Receivers can be sold for more than enough to satisfy the obligations of the Receivers, it is probable that unless the following or a similar plan is consummated the creditors may realize nothing whatsoever on the obligations held by them."

While all this was going on, however, in January of 1933 as part of the hearings in connection with the proposed sale of the assets, Mr. Lee Shubert (who was then one of the Receivers) through his attorney in open court stated as follows:

> "It is Mr. Shubert's desire that a plan of reorganization shall be worked out which will permit the creditors of Shubert Theatre Corporation to participate in such successor company. Efforts have been made in connection with certain groups of the creditors, to work out a satisfactory reorganization plan. So far, such plan has not been successfully worked out. *If, in*

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* The unsecured creditors were given common stock and rights to subscribe to some new common and preferred. The older stockholders were merely given a right to subscribe to new common and preferred.

collaboration with the several committees, it is impossible to work out such a plan, it is Mr. Shubert's intention to propose a plan on his own account and, if it is in any way possible to do so, to admit all of the creditors of the estate to some kind of participation in a reorganization company." (Italics ours.)

In March, Lee Shubert removed any disqualification to become a bidder at the sale or to be interested in the purchaser, by resigning as a receiver. In his application to resign Mr. Shubert made the following statement:

"Now that the property of said Shubert Theatre Corporation and the other corporations defendants herein have been decreed to be sold, it would seem probable that the main purpose of the receivership has been accomplished. It is further apparent that by virtue of your petitioner's investments in the Shubert Theatre Corporation and the other defendants corporations *the petitioner is vitally interested and desires to participate in the purchase of the assets of said defendants at said sale and in the reorganization of the defendant and in the reorganization of the properties so to be sold.*" (Italics ours.)

The Petitioner in this case is a corporation which was formed by Atel for the purpose of buying in the assets of the Old Corporation. On April 7, 1933 the Petitioner at a duly advertised and well publicized public auction sale bought in all the assets of the Old Corporation for a bid price of $400,000 which was the upset price fixed by the court. On April 25, 1933 Petitioner took title to all of the assets of the Old Corporation and as provided in the order which authorized the sale, it paid for the same using the $300,000 of receivers' certificates, $10,000 of accrued interest and $90,000 of cash. The sole stockholder of Peti-

tioner at this time was Atel which also transferred the necessary cash and receivers' certificates to the Petitioner in order to enable Petitioner to consummate the acquisition of all of the assets of the Old Corporation. The additional $90,000 cash which Atel advanced to Petitioner was obtained in the same manner as the cash originally employed to purchase the receivers' certificates, to wit: The Shubert partnership advanced the same to Dorsar which in turn advanced the same to Atel, which in turn advanced the same to Petitioner.

The value of the assets purchased did not exceed $400,000.

During the course of the equity receivership proceedings, at the sale and for a number of months prior to the sale counsel for the Petitioner, the Old Corporation, the Receivers, Lee Shubert and J. J. Shubert were aware of and familiar with the doctrine of the *Boyd* case (228 U. S. 482) and *St. Louis & San Francisco Railroad Co.* v. *Schiller* case (274 U. S. 304). The doctrine of the *Boyd* case is set forth at length beginning at page 18 of this brief. Under the doctrine of this case, subordinate rights of Lee and J. J. Shubert as stockholders and general creditors of the Old Corporation would have been deemed to have been secured at the expense of prior rights of prior general creditor and other shareholder; and hence void. Therefore the other general creditors and stockholders of the Old Corporation would have had a continuing interest. An offer had to be made to all of them.

On May 31, 1933 Lee Shubert wrote the stockholders and unsecured creditors of the Old Corporation a letter which said:

> "When the Court decided that the assets of the Corporation were to be sold at public auction, we offered the security holders a plan of reorganization, but the subscriptions were insufficient to carry it

through. Consequently, the assets were purchased by Select Theatres Corporation (in which I have a substantial interest) for the upset price fixed by the Court—$400,000. No other bidder appeared at the sale. The sale was confirmed by the Court, and the transfer of the assets has been substantially completed.

"Select Theatres Corporation will be recapitalized with an authorized capital to consist of $400,000 of 6% non-cumulative preferred stock, which may be issued up to the full amount of the price paid for the properties ($400,000), and 200,000 shares of common stock, with a nominal par value, both classes of stock being entitled to one vote per share.

"The stockholders of Shubert Theatre Corporation will, of course, receive nothing as a result of the sale of the Corporation's assets. Debenture holders and other creditors are entitled to their pro rata share of the purchase price after payment of expenses and Receiver's obligations; but it now appears likely that very little, if anything, will be available for distribution to debenture holders and other creditors when the receivership is finally wound up.

"Nevertheless, it is my earnest desire that those who invested their money in Shubert Theatre Corporation, under my management, shall have an opportunity to participate in the new company, and to benefit with the return of prosperity, if such time arrives. Accordingly, I have arranged for the issuance of 50% of the common stock of Select Theatres Corporation to security holders and creditors of Shubert Theatre Corporation, without cost to them.

"This stock, the greater portion of which would otherwise become part of my personal holdings, will be distributed on the following bases:

10 shares of common stock of Select Theatres Corporation in respect of each $1,000 debenture (with June 15, 1931, and subsequent coupons attached) of Shubert Theatre Corporation;

1 share of common stock of Select Theatres Corporation in respect of each $105 of allowed claims against Shubert Theatre Corporation;

1 share of common stock of Select Theatres Corporation in respect of each 10 shares of common stock of Shubert Theatre Corporation.

"Security holders and creditors of Shubert Theatre Corporation availing themselves of this offer should forward their securities or allowed claims to me in care * * * I will not take title to the securities and claims so forwarded but, acting as agent for the holders thereof, will surrender them to Shubert Theatre Corporation for cancellation. No transfer stamps or other expenses will be payable by those who take advantage of this offer. The debentures and allowed claims will not be cancelled until it is definitely known whether or not there will be anything available for distribution to the holders thereof. If anything should be available, I will collect the amount due upon the debentures and allowed claims surrendered by those who have accepted my offer, and will turn over to them the amounts which they are respectively entitled to, less expenses incurred by me in that connection."

As a result of the sending of this letter, Petitioner's capitalization was modified to consist of 40,000 shares of preferred stock, $10.00 par value and 200,000 shares of common stock 10¢ par value per share. 79,731 shares of common stock were issued in accordance with Lee Shu-

bert's letter aforementioned to the unsecured creditors and stockholders of the Old Corporation who accepted the offer, to wit: Over 86% of the holders of unsecured debentures, over 63% of holders of other unsecured claims, and over 82% of the number of the outstanding shares of the Old Corporation accepted Lee Shubert's offer. 38,050 shares of preferred stock were and 120,269 shares of common stock were issued to Atel.*

Petitioner has ever since continued to operate the assets and business it acquired from the Old Corporation.

After the distribution, Petitioner's capital stock was owned as follows:

Petitioner's Stock	*Relationship of New Owners to Old Corporation*
100% Preferred Stock and 60% Common Stock	was issued to Atel which owned 100% of the Receivers' Certificates, and which was indirectly owned by persons who were large creditors and stockholders of the Old Corporation
32 1/2% Common Stock	was issued to persons who owned over 76% of general unsecured creditors' claims against the Old Corporation
7 1/2% Common Stock	was issued to persons who constitute holders of 82% of capital stock of Old Corporation

All of these facts with relation to the offer of stock to the creditors and stockholders of the Old Corporation was reported to the Court by the Receivers in its Receivers Report #15 and said report of the Receivers was approved on April 10, 1934 by the same court order which approved

* This included 23,948 shares which creditors and stockholders of the Old Corporation did not pick up.

the transfer of the assets to Petitioner and the crediting of the receivers' certificates against the purchase price.

Based upon the law as it existed in 1933 at the time the transfer was made, it is Petitioner's contention that a tax free reorganization took place because one corporation acquired all of the assets of another corporation and there was continuity of proprietary interest. The District Court below held adversely to the Petitioner saying that continuity of interest did not exist because Petitioner was a mere purchaser; that Petitioner was not a creditor or stockholder of the Old Corporation, and that the interest that anyone acquired through the medium of the receivers' certificates could not be a basis for establishing continuity of proprietary interest; that a sale took place and there was no reorganization. The District Court also held that the distribution of stock made to the old creditors and stockholders could not be considered continuity of interest notwithstanding the fact that after the distribution was made the persons who constituted 100% stockholders of the Petitioner constituted the same persons who had not less than 100% of the receivers' certificate holders, over 76% of the unsecured creditors of the Old Corporation, and over 82% of stockholders of the Old Corporation. It is Petitioner's position that the Court of Appeals below erred when it affirmed the District Court's determination.

8. The federal jurisdiction in the Court of first instance was Sections 1331 and 1340 of Title 28 U. S. C. This case is a civil action wherein the matter in controversy exceeds the sum of $3,000 exclusive of interest and costs, and arises under the laws of the United States. It is a suit for the refund of excess profits taxes paid by Petitioner under the Internal Revenue Laws of the United States.

9. Argument relied on for the allowance of the Writ. The Writ should be allowed for the following reasons as noted below.

(a) The court below has decided a federal question in a way in conflict with applicable decisions of this court, i.e.: The doctrine of the *Alabama Asphaltic Limestone Company* case (315 U. S. 179) as set forth in *Palm Springs Holding Corporation* v. *Commissioner* (315 U. S. 185).

(b) The court below has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, i.e.: 8th Circuit, *Minneapolis, Northfield and Southern Railway* v. *Klem,* 117 F. S. 325 aff'd 225 F. (2) 909.

(c) The court below had decided an important federal question in a way in conflict with applicable decision of this court in the case of *Northern P. B. Co.* v. *Boyd* (228 U. S. 432).

(A) THE COURT BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH IS IN CONFLICT WITH THE HOLDINGS OF THIS COURT IN THE CASES OF *ALABAMA ASPHALTIC LIMESTONE COMPANY* v. *COMMISSIONER,* 315 U. S. 179 (1942); *PALM SPRINGS HOLDING CORPORATION* v. *COMMISSIONER,* 315 U. S. 185 (1942); *HELVERING* v. *SOUTHWEST CONSOLIDATED CORPORATION,* 315 U. S. 194 (1942); AND ALSO *HELVERING* v. *MINNESOTA TEA COMPANY,* 296 U. S. 378; *JOHN A. NELSON COMPANY* v. *HELVERING,* 296 U. S. 374; *HELVERING* v. *WATTS ET AL.,* 296 U. S. 387.

Section 112(i) of the 1932 Revenue Act provided that a reorganization occurred when one corporation acquired substantially all the assets of another corporation. This

court held however that the reorganization did not merely turn upon the literal language of the statute but that continuity of a proprietary interest had to be present. *Pinellas Ice and Coal Storage Co.* v. *Commissioner,* 287 U. S. 462 (1933); *LeTulle* v. *Scofield,* 308 U. S. 415 (1940). Just what circumstances might constitute continuity of interest have been defined by this court as "difficult to delimit." *Pinellas Ice and Coal Storage Co.* v. *Commissioner, supra.*

As the Court of Appeals, Fifth Circuit said in *Scofield* v. *San Antonio Transit Co.* (C. C. A. 5th), 219 F. (2) 149, cert. den. 350 U. S. 823:

> "The Courts do not purport to express any precise ironclad rule against which 'Continuity of interest' can be measured in every case. Compositely the cases mean simply that the facts must be presented from which it can reasonably be concluded that the new corporation is in substance the old enterprise in a new form."

There have been a large number of holdings that dealt with the subject matter of whether the transferor retained a substantial proprietary interest in the continuing enterprise. *Helvering* v. *Minnesota Tea Company, supra; John A. Nelson Co.* v. *Helvering, supra.* However, the problem of the identity of who really constituted the old proprietors of the assets which were transferred was presented to this Supreme Court in a group of cases decided in 1942. *Alabama Asphaltic Limestone Co.* v. *Commissioner, supra; Palm Springs Holding Corporation* v. *Commissioner, supra; Bondholders Committee, etc.* v. *Commissioner,* 315 U. S. 189 and *Helvering* v. *Southwest Consolidated Corporation,* 315 U. S. 196. In the *Alabama* case the respondent acquired all the assets of an insolvent corporation pursuant to a creditor's plan of reorganization consummated with the aid of the bankruptcy court. At the

sale by the bankruptcy trustee the creditors' committee was the successful bidder. The bid price was paid in substantially by agreements of creditors to accept stock of a new corporation in full discharge of their claims and by an offer of the committee to meet the various costs of administration. Pursuant to the plan, all the stock of the respondent was distributed among the creditors of the bankrupt company. The Government contended that the requisite continuity of interest was broken because the stockholders of the bankrupt corporation were eliminated by the plan (no portion whatever of their proprietary interest having been preserved for them in the new corporation), and hence there was no "reorganization." Recognizing that the old continuity of interest had been broken this court held that it was

> "immaterial that the bankruptcy sale shifted the ownership of the equity in the property from the stockholders to the creditors of the old corporation. Plainly, the old continuity of interest was broken. Technically that did not occur * * * until the judicial sale took place. For practical purposes, however, it took place not later than the time when the creditors took steps to enforce their demands against their insolvent debtor. In this case, that was the date of the institution of bankruptcy proceedings. From that time on they had effective command over the disposition of the property. The full priority rule of *Northern P. B. Co.* v. *Boyd,* 228 U. S. 482, applies to proceedings in bankruptcy as well as to equity receiverships. *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106. It gives creditors, whether secured or unsecured, the right to exclude stockholders entirely from the reorganization plan when the debtor is insolvent. See *In Re 620 Church Street Bldg. Corp.,* 229 U. S. 24. When the equity owners are excluded and the old creditors be-

come the stockholders of the new corporation, it conforms to realities to date their equity ownership from the time when they invoked the processes of the law to enforce their rights of full priority. At that time they stepped into the shoes of the old stockholders. The sale 'did nothing but recognize officially what had before been true in fact.' *Helvering* v. *New Haven & S. L. R. Co.* (C. C. A. 2d), 121 F. (2d) 985, 987."

The *Palm Springs* case which involved a reorganization under the 1932 Revenue Act (which is the same Revenue Act involved in the case at bar) was a companion one to the *Alabama* case and involved basically the same problem, although a different procedure was invoked to salvage the interest of the creditors.

There the Court said:

"The New Corporation acquired the assets directly at the trustee's and the foreclosure sales. The legal procedure employed by the creditors is not material. The critical facts are that the old corporation was insolvent and that its creditors took steps to obtain effective command over its property. For the reasons stated in Helvering v. Alabama Asphaltic Limestone Co., supra, the creditors at that time acquired the equivalent of the proprietary interest of the old equity owner. Accordingly, the continuity of interest test is satisfied" (pages 188, 189 of 315 U. S.).

Recognizing the law to be such, the court below nevertheless in substance held that (1) notwithstanding the fact that by the time the sale occurred the value of the assets in the Old Corporation had sunk so low that there was nothing left for the unsecured creditors or stockholders of the Old Corporation, (2) that the entire equity in the assets was vested solely in the receivers' certificates and

(3) that this condition existed prior to the sale, the holders of the receivers' certificates could not be considered as being a party who had a proprietary interest in the assets of the Old Corporation prior to the sale and retained such interest in the new corporation after the sale. Thus, the Court below said there could not be continuity of interest, and refused to apply the doctrine of the *Alabama* case.

It is the position of Petitioner that when the value of the assets during the pendency of the receivership sunk so low as to leave no equity in the old general creditors and stockholders and the entire equity was in the holders of the receivers' certificates, "the equivalent of the proprietary interest of the old equity owner" (*Palm Springs* case, see above quote) was vested in the holders of the receivers' certificates; and that when these holders bought them in, there was present the requisite continuity of interest within the meaning of the *Alabama* case.

(B) THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE 8th CIRCUIT, TO WIT: *MINNEAPOLIS, NORTHFIELD AND SOUTHERN RAILWAY* v. *KLEM,* 117 FED. SUP. 325 (1953) AFFIRMED 225 FED. 2d 909 (8th CIR. 1955).

In the *Minneapolis, Northfield and Southern Railway Company* case the Railway went into a receivership proceeding and during the pendency of the receivership proceeding certain of the substantial creditors sold at a discount their claims to persons who had been strangers to the Old Corporation. These strangers bought in the assets at a sale and used the claims they had bought to pay therefor. The court held in that case that there was continuity of interest even though the purchaser had not been a creditor at the time the insolvency proceedings had com-

menced but rather were persons who had acquired the claims at a discount during the proceedings. It is Petitioner's position that there is no substantial difference between the case at bar and the situation of the taxpayer in the *Minneapolis* case. The District Court in the case at bar differentiated the case at bar from the *Minneapolis* case on the theory that in the *Minneapolis* case the assignee, although it acquired its interest subsequent to the institution of the receivership proceedings, had acquired an interest which had existed at the time the insolvency proceedings commenced; but that petitioner's interest did not exist at the time the receivership proceedings commenced. It is petitioner's position in the case at bar that the reality of the situation was that by permitting the receiver to place a lien on the assets prior in right to those of the general creditors and stockholders, the general creditors and stockholders of the Old Corporation were in effect mortgaging their proprietary interest. It came to pass that the value of the assets declined to a point where there was no equity left in the creditors or stockholders with the result that at the sale of the assets the holders of the receivers' certificates bought in the assets. In effect, the old creditors assigned their claims against the assets to the holders of the receivers' certificates. Surely there can be no real distinction between the two cases because of this. Thus, there is a conflict between the holdings of the Court of Appeals for the 2nd Circuit and the Court of Appeals for the 8th Circuit.

(C) THE HOLDING OF THE COURT BELOW IS IN CONFLICT WITH THE HOLDING OF THIS COURT IN THE CASE OF *NORTHERN P. B. CO.* v. *BOYD*, 228 U. S. 482 (1913). The principle of the *Boyd* case was to the effect that full priority had to be given to each class of interest in a bankruptcy or equity receivership before the next class could be provided for; and even though a

foreclosure proceeding or reorganization or transaction subsequent thereto may take place which leaves any interest in a junior creditor or stockholders to the exclusion of a prior creditor is void or voidable as a matter of law even in the absence of fraud. (See footnote below.*) See also *St. Louis and San Francisco R.R. Co.* v. *Schiller,* 274 U. S.

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* In the *Boyd* case, it was said at pages 560, 561 of 33 Sup. Ct. Rep.:

"Such and similar possibilities at one time caused doubts to be expressed as to whether a court could permit a foreclosure sale which left any interest to the stockholders. But it is now settled that such reorganizations are not necessarily illegal, and, as proceedings to subject the property must usually be in a court where those who ask equity must do equity, such reorganizations may even have an effect more extensive than those made without judicial sale, and bind creditors who do not accept fair terms offered. The enormous value of corporate property often makes it impossible for one, or a score, or a hundred bondholders to purchase, and equally so for stockholders to protect their interests. A combination is necessary to secure a bidder and to prevent a sacrifice. Co-operation being essential, there is no reason why the stockholders should not unite with the bondholders to buy in the property.

"That was done in the present case. And while the agreement contained no provision as to the payment of unsecured creditors, yet the railway company purchased unsecured claims aggregating $14,000,000. Whether they were acquired because of their value, to avoid litigation, or in recognition of the fact that such claims were superior to the rights of stockholders, does not appear, nor is it material. For, if purposely or unintentionally a single creditor was not paid, or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. They were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor, was invalid. Being bound for the debts, the purchase of their property, by the debts, the purchase of their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim, they were

304; *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106; *Louisville Trust Co.* v. *Louisville, N. A. & C. R. Co.*, 174 U. S. 683. In the case at bar Lee Shubert and J. J. Shubert owned either directly or indirectly 71,680 shares of the Old Corporation stock (34% of the outstanding total); $619,000 principal amount of unsecured debentures (9.7% of the outstanding debentures) and $660,000 of other debt (some secured, some unsecured). They also owned through Atel, 100% of the receivers' certificates which were a lien on all of the free assets of the Corporation prior to the other creditors. In addition to this, the Shuberts personally were at all times the management of the Old Corporation;

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none the less bound to recognize his superior right in the property, when, years later, his contingent claim was liquidated and established. That such a sale would be void, even in the absence of fraud in the decree, appears from the reasoning in Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 174 U. S. 683, 43 L. ed. 1134, 19 Sup. Ct. Rep. 827, where, 'assuming that foreclosure proceedings may be carried on to some extent, at least, in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder),' the court said that 'no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. . . . Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.'

"6. The railway seeks to distinguish that case from this, insisting that even if the stockholders' participation in the reorganization would have invalidated the proceeding, such result does not follow here because the court having charge of the foreclosure passed on this very question before the sale in 1896 and dismissed the bill of Paton, an unsecured creditor, when he made exactly the same attack upon the reorganization as that by Boyd in this bill. That court then held that as the property was insufficient to pay the mortgage debts of $157,000,000, there was nothing which could come to the unsecured creditors, and they, therefore, had no ground to complain if the bondholders were willing to give new shares to the old stockholders. No appeal was taken from that decision,—possibly because the Paton claim was purchased by

Lee Shubert had been one of the equity receivers up until the very end when he resigned so he could bid in the assets and participate in the reorganization of the assets and the company. Prior to the order being made decreeing the sale of the assets of the Old Corporation, Lee Shubert though his attorney in open court stated that if the reorganization committee could no. work out a plan of reorganization, he would work out himself a plan of reorganization and would "admit all of the creditors of the estate to some kind of participation in a reorganization company." Within a month and five days after the Petitioner acquired

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the railway. But inasmuch as Boyd was not a party to the record, that decree was not binding upon him as *res judicata*, and the opinion, not being controlling authority, cannot be followed in view of the principles declared in Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 174 U. S. 674, 43 L. ed., 1130, 19 Sup. Ct. Rep. 827.

"In saying that there was nothing for unsecured creditors, the argument assumes the very fact which the law contemplated was to be tested by adversary proceeding in which it would have been to the interest of the stockholders to interpose every valid defense. If, after a trial, a sale was ordered, they were still interested in making the property bring its value, so as to leave a surplus for themselves as ultimate owners. Even after sale they could have opposed its confirmation if the bids had been chilled, or other reason existed to prevent its approval. In the present case all these tests and safeguards were withdrawn. The stockholders, who, in lawfully protecting themselves, would necessarily have protected unsecured creditors, abandoned the defense that the foreclosure suit had been prematurely brought. The law, of course, did not require them to make or insist upon that defense if it was not meritorious, nor does it condemn the decree solely because it was entered by consent. But the shareholders were not merely quiescent. They, though in effect defendants, became parties to a contract with the creditors, who were in effect complainants, by which, in consideration of stock in the new company, they transferred their shares in the railroad to the railway. The latter then owning the bonds of the complainant and controlling the stock in the defendant, became the representative of both parties in interest. In such a situation there was nothing to litigate, and so the demurrer to the bill was withdrawn. An answer was immedi-

the assets of the Old Corporation, the letter making the offer to the debenture holders, creditors and stockholders of the Old Corporation was made with the resultant exchange of stock. This exchange was reported to the District Court in the receivership proceeding and approved by the court.

(1) Taking all the facts together this exchange must be considered a part of a preconceived plan of reorganization that Mr. Shubert intended to make as above indicated in his statement to the Court prior to the sale that he would admit all creditors to some kind of participation in a reorganization company, or

(2) Petitioner was compelled under the doctrine of the *Boyd* case to admit the old creditors to participate in the petitioner because otherwise it would have been a situation where Lee and J. J. Shubert as stock-

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ately filed, admitting all the allegations of the bill. On the same day, 'no one opposing,' a decree of foreclosure and sale was entered. Two months later the property was sold to the agreed purchaser at the upset price named in the decree. In a few days and by consent that sale was confirmed. As between the parties and the public generally, the sale was valid. As against creditors, it was a mere form. Though the Northern Pacific Railroad was divested of the legal title, the old stockholders were still owners of the same railroad, encumbered by the same debts. The circumlocution did not better their title against Boyd as a nonassenting creditor. They had changed the name, but not the relation. The property in the hands of the former owners, under a new charter, was as much subject to any existing liability as that of a defendant who buys his own property at a tax sale.

"The invalidity of the sale flowed from the character of the reorganization agreement regardless of the value of the property, for in cases like this, the question must be decided according to a fixed principle, not leaving the rights of the creditors to depend upon the balancing of evidence as to whether, on the day of sale, the property was insufficient to pay prior encumbrances."

holders and junior creditors of the Old Corporation would have been participating in the petitioner to the exclusion of other old creditors and stockholders.

A plan of reorganization need not be ready at the time of sale. It can be devised long afterwards. Cf. *Helvering* v. *Southwest Consolidated Corporation,* 315 U. S. 194 (1942) (18 months); see also *Roosevelt Hotel Co.* v. *Commissioner,* 13 T. C. 399 (acquiesced in by the Commissioner) wherein the plan of reorganization was adopted four years after the committee acquired the property, originally for the purposes of liquidation.

As was apparent to this court in the *Boyd* case, if the Shuberts had not had an interest adverse to the general creditors and stockholders in the Old Corporation, they in lawfully protecting themselves would have necessarily protected the others of the same class. However, the opportunity existed by reason of their holding the lien under the receivers' certificates to abandon the interests of others of like kind for the sole protection of themselves. Whether they did so or not is immaterial. The court said in the *Boyd* case of necessity they had to admit all the others of the same class to participate in the reorganized company. Whether this interest represents a proprietary interest or control, certainly the distribution of the stock to them was in recognition of their interest. Whether the interest was given to them to avoid litigation or not, recognition of their superior rights is immaterial according to the *Boyd* case. The court in the instant case in failing to recognize this principle creates a definite conflict between the decision of the court below and the holding of this court in the *Boyd* case. Judge Bicks in his opinion in the District Court which was affirmed in the Court of Appeals, approves the very thing which this Supreme Court condemned.

"The property in the hands of the former owners, under a new charter, was as much subject to any existing liability as that of a defendant who buys his own property at a tax sale.

"The invalidity of the sale flowed from the character of the reorganization agreement regardless of the value of the property, for in cases like this, the question must be decided according to a fixed principle, not leaving the rights of the creditor to depend upon the balancing of evidence as to whether, on the day of sale, the property was insufficient to pay prior encumbrances." (Page 561 of 33 Sup. Ct. Rpt.)

10. There is appended hereto the per curiam opinion of the United States Court of Appeals for the Second Circuit (not reported yet).

Further, the opinion of Judge Bicks in the court of original jurisdiction (145 Fed. Sub. 583) which was printed as part of the appendix in the appeal to the Court of Appeals, is also appended hereto for the convenience of the court.

CONCLUSION

In view of the above, Petitioner respectfully prays that a Writ of Certiorari be granted.

Dated: New York, New York
February 1, 1958

VICTOR R. WOLDER
Attorney for Petitioner
Office and P. O. Address
347 Madison Avenue
Borough of Manhattan
New York 17, New York

APPENDIX

Section 112(i) of the Revenue Act of 1932.

"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, (C) a recapitalization, or (D) a mere change in identity, form or place of reorganization however effected."

Section 113(a)(7) of the Revenue Act of 1932.

"(7) Transfers to corporation where control remains in the same persons. If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer."

Section 113(a)(7)(A) of the 1939 Internal Revenue Code, as amended.

"Sec. 113—ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS

(a) BASIS (unadjusted) or PROPERTY. The basis of property shall be the cost of such property; except that

* * * * *

(7) TRANSFERS TO CORPORATION—If the property was acquired—

(A) After December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

* * * * *

(B) In a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization.

Then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer."

Section 113(a)(12) of the 1939 Internal Revenue Code, as amended.

"BASIS ESTABLISHED BY REVENUE ACT OF 1932—If the property was acquired, after February 28, 1913, in any taxable year beginning prior to January 1, 1934, and the basis thereof, for the purposes of the Revenue Act of 1932, 47 Stat. 199, was prescribed by section 113(a)(6)(7) or (9) of such Act, then for the purposes of this chapter the basis shall be the same as the basis therein prescribed in the Revenue Act of 1932." IRC 113(a)(12).

Section 718(a) of the 1939 Internal Revenue Code, as amended.

"(1) MONEY PAID IN—Money previously paid in for stock, or as paid in surplus, or as a contribution to capital;

(2) PROPERTY PAID IN—Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. If the property was disposed of before such taxable year, such basis shall be determined under the law applicable to the year of disposition, but without regard to the value of the property as of March 1, 1913. If the property was disposed of before March 1, 1913, its basis shall be considered to be its fair market value at the time paid in. If the unadjusted basis of the property is a substituted basis, such basis shall be adjusted, with respect to the period before the property was paid in, by an amount equal to the adjustments proper under section 115 (1) for determining earnings and profits;"

Section 760 of the 1939 Internal Revenue Code, as amended.

"Sec. 760 (Internal Revenue Code). (a) DEFINITIONS. For the purpose of this section—

(1) 'EXCHANGE,' 'TRANSFEROR,' and 'TRANSFEREE'—The term 'exchange' means a transaction by which one corporation (hereinafter called 'transferee') receives property of another corporation (hereinafter called 'transferor') and the basis of the property received, in the hands of the transferee, for the purposes of section 718 (a) is determined by reference to the basis in the hands of the transferor.

(2) 'DETERMINATION OF BASIS OF PROPERTY RECEIVED'—The basis, in the hands of the transferee, of the property of the transferor received by the transferee upon the exchange shall be determined in accordance with section 718 (a).

(b) RULE—In the application of section 718(a) to a transferee upon an exchange in determination of the amount paid in for stock of the transferee, or as paid-in surplus or as a contribution to capital of the transferee, in connection with such exchange, only an amount shall be deemed to have been so paid in equal to the excess of the basis in the hands of the transferee of the property of the transferor received by the transferee upon the exchange over the sum of

(1) The amount of any liability of the transferor assumed upon the exchange of any liability subject to which such property was so received, plus

(2) The amount of any liability of the transferee (not arising out of any liability described in paragraph (1) constituting consideration for the property so received, plus

(3) The aggregate of the amount of any money and the fair market value of any other property (other than such stock and other than property described in paragraph (1) and (2) transferred to the transferee.

(c) REDUCTION IN DAILY INVESTED CAPITAL—In the application of section 717 to a transferee upon an exchange, the daily invested capital for any day after such exchange shall be reduced by an amount equal to the amount by which the sum of the amounts specified in paragraphs (1), (2) and (3) of subsection (b) exceeds the basis in the hands of the transferee of the property of the transferor received upon the exchange."

Opinion by Bicks, *D.J.*

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 52-331

SELECT THEATRES CORPORATION,

Plaintiff,

—against—

JAMES W. JOHNSON, Collector of Internal Revenue,

Defendant.

Appearances:

VICTOR R. WOLDER,
Attorney for Plaintiff,
347 Madison Avenue,
New York City.

J. EDWARD LUMBARD, United States Attorney for the Southern District of New York,
Attorney for Defendant,
United States Court House,
New York 7, N. Y.

THOMAS C. BURKE,
Assistant U. S. Attorney,
Of Counsel.

BICKS, *D.J.*:

Plaintiff claims to have overpaid income and excess profits taxes for its fiscal year ended June 30, 1943 by $143,069.79 and brings this suit to recover the alleged

overpayment. Its right to prevail turns principally upon

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whether certain of its assets were acquired in a tax-free reorganization.

The Internal Revenue Code of 1939, section 710, imposed a tax on the "adjusted excess profits net income" of corporate taxpayers. Broadly speaking, this was the taxpayer's net income for the year, reduced by a credit deemed to represent the normal or non-excess earnings. Taxpayers were permitted a choice of basis of computing the credit, either on average earnings during the pre-war period 1936 to 1939, or on a return on the amount of capital invested in the enterprise. Plaintiff chose to employ the latter method in determining its tax liability for the tax year under review. It asserts, however, that the credit was computed on what it erroneously conceived to be its "invested capital" with the result that the credit to which it was entitled was grossly understated.

For the fiscal year here involved plaintiff filed a consolidated income and excess profits tax return, covering the operations of itself and its twenty-two wholly-owned subsidiaries[1] which disclosed a liability for taxes in the

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following amounts, all of which were paid:

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[1] Plaintiff, during the taxable year, owned all of the issued and outstanding stock of the following corporations: Select Operating Corporation; Barrymore Theatre Corp.; Century Library, Inc.; Forrest Theatre Company of Phila.; Jayson Building Co. Inc.; Modern Theatre Corporation; 635 Greenwich Street Co., Inc.; 620 W 47 St. Corp.; Stage Costumes, Inc.; Select Lake City Theatre Operating Co.; Acre Realty Co. Inc.; Louisville Amusement & Operating Co.; Opera Under the Stars, Inc.; Sam S. Shubert Amusement Co. Inc.; Walnut & Quince Sts. Corp.; Dee Theatre Corporation; Detroit Downtown Theatre Corporation; Performing Rights Society of the Theatre, Inc.; April Productions Inc.; Continental Music Publishing Co. Inc.; Operatic Festival, Inc.; Ddot Theatre Corporation.

ncome Tax	$ 57,712.73
Declared Value Excess Profits Tax	2,352.74
Excess Profits Tax	132,178.18
	$192,243.65

On December 6, 1946 plaintiff filed a claim for refund of $44,963.42. An amended claim increasing the amount of refund demanded to $142,999.79,[2] was filed on July 16, 1948.

Section 718(a) of the Internal Revenue Code of 1939 provides that the invested capital credit is determined by referring to the property *paid into* the corporation "for stock or as paid-in-surplus, or as a contribution to capital," and including the same "in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange." Under Section 760 of the 1939 Code the basis to the transferee of property *transferred* in a tax-free exchange is determined by reference to the basis of such property in the hands of the transferor or predecessor corporation.[3] Plaintiff paid $400,000. for the assets in question. The basis thereof in the hands of its vendor was upwards of $4,000,000. In the tax return as filed taxpayer treated the

amount it paid for the assets as its invested capital. The claim for refund is predicated on an invested capital in an amount equal to the vendor's basis for said assets.

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[2] The parties have stipulated, and the pre-trial order provides, that the computation of the amount, if any, to be recovered by plaintiff shall await the determination of the legal issues involved.

[3] Internal Revenue Code of 1939, sections 760(a) and 113 (a)(7).

Opinion

Shubert Theatre Corporation (referred to herein as "Shubert") was organized in 1924 for the purpose of taking over the theatrical enterprises which had been conducted for approximately twenty-five years by Messrs. Sam S., Lee and J. J. Shubert. It was one of the principal producers of so-called "legitimate" theatrical attractions in the United States and the largest operator of "legitimate" theatres. The business had been highly profitable and continued so through its fiscal year which ended June 30, 1929. The severe decline in the securities markets in the last quarter of 1929 and the general business depression which followed had a marked adverse effect on the theatrical industry, Shubert included. For the fiscal year ended June 30, 1930, it sustained a net loss of $1,231,000., for the succeeding fiscal year $1,672,000.; and for the period July 1, 1931 to October 20, 1931, $1,187,000.; a loss in the aggregate during this period of approximately twenty-eight months, of $4,090,000. Shubert then found itself unable to discharge its obligations as they matured with the result that on October 20, 1931, a bill of complaint in an equity receivership proceeding was filed in this court by a general creditor. Shubert's answer admitted the allegations of the

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complaint and joined in the prayers for relief contained therein. Irving Trust Company, a New York banking corporation, and Lee Shubert, were thereupon appointed receivers.[4]

At the date the receivership proceedings were instituted Shubert's liabilities consisted of $6,360,000. 6% gold debentures due June 15, 1942; $323,000. accumulated inter-

[4] Subsequent to October 20, 1931, the receivership was extended to include all of Shubert's wholly-owned subsidiaries.

est on said debentures; $1,158,000. notes and accounts payable; Federal amusement taxes payable $9000.; and $284,000. deferred credits.[5] The capital stock consisted of 218,160 shares without par value of which 210,360 were issued and outstanding and 7800 were held in the treasury. Messrs. Lee and J. J. Shubert owned, either directly or indirectly, 71,680 shares of Shubert stock (34% of the total outstanding shares); $619,000. principal amount of Shubert 6% gold debentures (9.7% of the total outstanding debentures); and $660,000. of other debt.

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During the operation of the business by the receivers the liquid assets continued to dwindle. In order to provide funds for payment of the expenses of administration and the continued operation of the business, the receivers were authorized in April 1932 to create a second issue[6] of interest bearing certificates of indebtedness or receiver's certificates in a principal amount not in excess of $400,000. maturing not later than March 1, 1933, and to sell all or any part thereof up to $300,000. in principal amount. The order provided, *inter alia,* that (i) the certificates shall not impose any personal liability on the receivers otherwise than as receivers of Shubert; (ii) the certificates shall be

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[5] Mortgages on real estate totaling $10,749,000. and accrued interest thereon are omitted, it not appearing whether and to what extent, if any, Shubert was liable for deficiencies. Real estate taxes totaling $493,000. likewise are omitted—the City of New York may look for collection only to the property on which the tax liens attach. *Haight* v. *Mayor,* 99 N. Y. 280 (1885); *People ex rel. Meyers* v. *Moynahan,* 130 App. Div. 46 (1st Dept.), 114 N. Y. S. 417 (1909). See *Paddell* v. *City of New York,* 211 U. S. 446 (1908).

[6] A first issue of certificates in the amount of $50,000. was sold during the period October 28, 1931 to February 1, 1932. These certificates were retired, with interest, and are not involved in this case.

secured by (a) a direct charge upon the receivership estate, (b) a lien upon all the assets in the possession of the receivers, subject and subordinate to all valid liens on any part of the assets covered thereby existing at the date of the appointment of the receivers, but prior and superior to the 6% gold debentures due June 15, 1942, and all other unsecured debts, (c) such charge and lien shall rank equally with the charge or lien of all other obligations of the receivers incurred in the operation of the business, except administration expenses, which, by operation of law, may be entitled to priority thereto, (d) such charge or lien shall not, so long as the receiver shall not be in default in the

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payment of said certificates when due, limit or restrict the right of the receivers to dispose of any assets then in their hands or which may thereafter come in their hands in the conduct of the business, or to apply such assets or the proceeds thereof to the payment of expenses and indebtedness incurred by the receivers in the conduct of the business, (e) all the certificates, at the election of the holders thereof, shall become immediately due and payable upon any sale of the assets in satisfaction of any final decree and the termination of the receivership, or in the event that Shubert shall be adjudged bankrupt and (f) the receivers were authorized, by agreement with the holders of the certificates, to extend the maturity date for a period not exceeding three months from March 1, 1933.

The entire issue of said receivers' certificates was sold to The Atel Co., Inc., hereinafter referred to as "Atel." Atel was organized on March 23, 1932 under the Laws of the State of New Jersey. At least from May 1932 all its outstanding stock was owned by Dorsar Enterprises, Inc., a New York corporation, which was 100% owned by the Shuberts individually. The funds employed by Atel for the

purpose of purchasing the receivers' certificates came to it by loan from Dorsar Enterprises, Inc., the latter having previously borrowed a like sum from the Shuberts. Atel

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was neither a stockholder nor creditor of Shubert or any of its subsidiaries.[7]

Efforts in the direction of effecting a reorganization met with no success. The amount of cash and the value of assets readily convertible into cash in the hands of the receivers continued to decline. In the opinion of the receivers further operation of the business might have resulted in further losses. Thus circumstanced, the receivers on January 4, 1933 recommended that the properties and assets in their hands be sold and the proceeds thereof distributed among those entitled thereto. Upon the petition of the receivers a decree was made under date of January 21, 1933, directing that, the assets be sold, either in bulk or in separate parcels, to the highest bidder or bidders (in case of a bulk sale an upset price of $400,000. was fixed); any creditor or any stockholder, director or officer of Shubert may purchase the assets in his own right, and Lee Shubert, one of the receivers, may likewise bid at such sale, or may be interested in any corporation that shall bid thereat and he or any such corporation may purchase the assets in his or in its own right provided that he shall have resigned as receiver prior to the date of the sale; and further, that

> "no sale of the * * * assets * * * shall be confirmed to any purchaser on behalf of, or for the benefit of,

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[7] It does not appear from the record whether Dorsar Enterprises, Inc. was a stockholder or creditor of Shubert or any of its subsidiaries.

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any corporation organized or to be organized with the intention that it shall become the owner of said * * * assets * * * pursuant to any plan or agreement of reorganization unless at or before the sale * * * such purchaser shall have filed with the Special Master a complete copy of such plan or arrangement * * * and no sale of any property * * * to any purchaser who is to purchase such property pursuant to any such plan or agreement shall be confirmed if the Court shall determine that the provisions of such plan * * * are inequitable * * *. So much of the purchase price as may not be required by the Court to be paid in cash may be paid in whole or in part by delivery to the Special Master, * * * outstanding Receivers' Certificates of Indebtedness and/or claims allowed * * *, including claims in respect of the 6% Gold Debentures * * *. The purchaser shall be credited on account of the purchase price with such sum * * * as would be payable in cash, out of the proceeds of the sale, in respect of said Receivers' Certificates of Indebtedness. Debentures, * * * and other claims, if the whole amount of the purchase price were paid in cash."

Lee Shubert removed any disqualification to become a bidder at the sale or interested in the purchaser by resigning as receiver. The sale pursuant to said decree originally scheduled for February 24, 1933 was adjourned from time to time to April 7, 1933. As a condition to the last adjournment Lee Shubert bound himself to bid or cause to be bid not less than $400,000. for the assets held in the receivership estate. At the sale the assets were struck down in bulk to the only bidder—Select Theatres Corporation, the plaintiff herein, for $400,000. Upon the Special

Master's report of sale and petition of the plaintiff herein a decree was entered confirming the sale. The petition recited that plaintiff intended to deliver the receivers'

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certificates to the Special Master on account of the purchase price and prayed that the Special Master be directed to credit on account of the purchase price such sums as would be payable out of the proceeds of sale in respect of said receivers' certificates if the whole amount of the purchase price were paid in cash. The confirmatory decree authorized the Special Master to accept said certificates as pro tanto payment of the purchase price. It recited further

> "it appearing to the Court that said Select Theatres Corporation has not been organized with the intention that it shall become the owner of the properties and assets of defendants, or any part thereof, or any beneficial interest therein, pursuant to any plan or agreement of reorganization, and does not propose to purchase said properties and assets, or any part thereof, on behalf of, or for the benefit of, any other corporation organized or to be organized with such intention."

Select Theatres Corporation, the successful bidder, was organized on April 5, 1933, two days before the sale. Its original authorized capital stock consisted of 200 shares of common stock without par value. At its first meeting the Board of Directors accepted an offer by Atel to purchase 101 shares of its common stock for $404,000. to be paid, $300,000. by delivery of the receivers' certificates and the balance, less accrued interest on said certificates in cash. On April 17, 1933, the subscription agreement was

modified. Under the amended agreement Atel subscribed to 140 shares for $14,000. and agreed to loan to the com-

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pany $390,000. (in cash and the aforesaid receivers' certificates) against its one year note.

The purchase at the Special Masters sale was consummated on April 25, 1933. Payment of the purchase price was made by delivery of the receivers' certificates duly endorsed, plus $90,009.52 in cash[8] representing the difference between the principal amount of the receivers' certificates plus accrued interest and the $400,000. purchase price. The cash proceeds of the sale were applied to the payment of expenses of administration by the estate in receivership after which no amount whatever remained available for distribution among the creditors or stockholders of Shubert.

On or about May 31, 1933 Lee Shubert addressed a communication to the creditors and stockholders of Shubert, stating in part:

> "When the Court decided that the assets of the Corporation were to be sold at public auction, we offered the security holders a plan of reorganization, but the subscriptions were insufficient to carry it through. Consequently, the assets were purchased by Select Theatres Corporation (in which I have a substantial interest) for the upset price fixed by the Court—$400,000. No other bidder appeared at the sale. The sale was confirmed by the Court, and the transfer of the assets has been substantially completed.

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[8] This cash was obtained in the same manner as the cash originally employed to purchase the receiver's certificates, i.e., the Shubert partnership advanced the same to Dorsar Enterprises, Inc., which in turn advanced the funds to Atel, and the latter supplied them to plaintiff.

"Select Theatres Corporation will be recapitalized with an authorized capital to consist of $400,000 of

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6% non-cumulative preferred stock, which may be issued up to the full amount of the price paid for the properties ($400,000), and 200,000 shares of common stock, with a nominal par value, both classes of stock being entitled to one vote per share.

"The stockholders of Shubert Theatre Corporation will, of course, receive nothing as a result of the sale of the Corporation's assets. Debentureholders and other creditors are entitled to their pro rata share of the purchase price after payment of expenses and Receiver's obligations; but it now appears likely that very little, if anything, will be available for distribution to debenture holders and other creditors when the receivership is finally wound up.

"Nevertheless, it is my earnest desire that those who invested their money in Shubert Theatre Corporation, under my management, shall have an opportunity to participate in the new company, and to benefit with the return of prosperity, if such time arrives. Accordingly, I have arranged for the issuance of 50% of the common stock of Select Theatres Corporation to security holders and creditors of Shubert Theatre Corporation, without cost to them.

"This stock, the greater portion of which would otherwise become part of my personal holdings, will be distributed on the following bases:

10 shares of common stock of Select Theatres Corporation in respect of each $1,000 debenture (with June 15, 1931, and subsequent coupons attached) of Shubert Theatre Corporation;

1 share of common stock of Select Theatres Corporation in respect of each $105 of allowed claims against Shubert Theatre Corporation;

1 share of common stock of Select Theatres Corporation in respect of each 10 shares of common stock of Shubert Theatre Corporation.

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* * * * *

"Security holders and creditors of Shubert Theatre Corporation availing themselves of this offer should forward their securities or allowed claims to me in care * * * I will not take title to the securities and claims so forwarded but, acting as agent for the holders thereof, will surrender them to Shubert Theatre Corporation for cancellation. No transfer stamps or other expenses will be payable by those who take advantage of this offer. The debentures and allowed claims will not be canceled until it is definitely known whether or not there will be anything available for distribution to the holders thereof. If anything should be available, I will collect the amount due upon the debentures and allowed claims surrendered by those who have accepted my offer, and will turn over to them the amounts which they are respectively entitled to, less expenses incurred by me in that connection."

To permit of issuance of the stock in accordance with said letter plaintiff caused its authorized capitalization to be modified to consist of 40,000 shares of 6% non-cumulative preferred stock par value $10.00 per share, and 200,000 shares common stock par value 10 cents per share. The 140 shares of common stock no par value, previously authorized to be issued, were exchanged for 1400 shares of preferred

stock. Atel's subscription agreement as previously amended was further modified. Instead of loaning plaintiff $390,000., Atel subscribed to 36,650 shares of preferred stock and 200,000 shares of common stock and agreed to pay therefor $366,500. and $20,000. respectively. 100,000 shares of said common stock were set aside for distribution to the debenture holders, general creditors and stockholders of

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Shubert in accordance with the offer contained in Lee Shubert's letter. Of the shares of common stock thus set aside an aggregate of 79,731 shares were ultimately distributed among the holders of $5,472,000 principal amount of the 6% debentures (over 86% of the total amount outstanding); the holders of $692,963.20 face amount of general claims (over 63% of the total claims allowed in the receivership); and the holders of 175,361 shares of the capital stock of Shubert (over 82% of the number of shares outstanding), in the amounts and proportions set out in the aforementioned letter. The remaining 20,629 shares of common stock were ultimately issued to Atel. It would appear, therefore, that the cost to Atel of 38,050 shares of preferred stock and 120,269 shares of common stock, was $400,500. Ascribing to the preferred stock its par value, approximately 60% of the common stock of plaintiff cost Atel $20,000.

In response to an inquiry from a Shubert stockholder who had accepted the offer set forth in Lee Shubert's letter, plaintiff's treasurer under date of March 31, 1936, advised him that the shares of Select Theatres Corporation he received was purely a gratuitous offer by Lee Shubert, the stock did not originate from Shubert Theatre Corporation, the stock was not offered under any plan of reorganization and that the offer of stock was made subsequent

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to the sale of the assets. The letter in full, is set forth in the margin.[9]

Plaintiff's origin and background have been developed at length because of the claim that, with these credentials plaintiff may gain entry into the golden circle of corporate legatees. The conclusion is inevitable, however, that its ancestor, Shubert, was put to death on the auction block under circumstances that plaintiff may not collect its claimed inheritance—a "basis windfall" giving it a basis for its assets far above the market value thereof at the time of acquisition and upwards of ten times the amount it paid for them.

Plaintiff does not, and indeed cannot, urge that the gratuitous distribution of a portion of its voting securities to former creditors and stockholders of Shubert was in pursuance of or constituted a plan of agreement of reorganization. Its claim in essence is that plaintiff's ownership of the receivers' certificates, the order authorizing the Spe-

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cial Master to accept, and his acceptance of, the receivers' certificates as payment on account of the purchase price in lieu of cash, constituted a tax-free reorganization under Section 112 of the Revenue Act of 1932.

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[9] "Your letter of March 27, 1936, addressed to Mr. Lee Shubert has been referred to me for attention. As former comptroller of the Shubert Theatre Corporation and as present Treasurer of the Select Theatres Corporation, I am in a position to give you the information requested.

"Your understanding that the ten shares of Select Theatres Corporation which you received, was purely a gratuitous offer by Mr. Lee Shubert, is correct. The stock did not originate from the Shubert Theatre Corporation nor was it offered to you under any plan of reorganization. The assets of the Shubert Theatre Corporation were sold in the receivership proceedings and were entirely insufficient to meet its debts and such sale did occur prior to the offer of the ten shares of stock."

This contention is challenged by the defendant. It urges that the ownership of the receivers' certificates did not confer upon plaintiff an "equity" in Shubert and that there is lacking the "continuity of interest" necessary to support a tax-free reorganization.

The 1932 Act, Section 112(j), defines a reorganization, insofar as here material, thusly:

> "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of * * * substantially all the properties of another corporation) * * * "

Whether a transaction qualifies as a reorganization under the Revenue Act does not turn alone upon a compliance with the literal language of the statute. *Commissioner of Internal Revenue* v. *Gilmore's Estate,* 130 F. 2d 791 (3d Cir. 1942). The words of the statute within the parenthesis expand the meaning of "merger" or "consolidation" so as to include some transactions which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 287 U. S. 462, 470 (1933). In the *Pinellas* case the

transfer of assets from one corporation to another for well secured short-term notes like the purchase for money of the assets of one company by another, was held to have no real resemblance to a merger or consolidation and beyond the evident purpose of the statute. It was subsequently held that the term of the obligation, whether long-term bonds or short-term notes is not material. *LeTulle* v. *Scofield,*

308 U. S. 415 (1940). Unless the transferor retains a definite and substantial proprietary interest in the enterprise,[10] the transfer does not amount to a reorganization within the true meaning of the statute, but is a sale upon which gain or loss must be reckoned. *Pinellas Ice & Cold Storage Co.* v. *Commissioner, supra; Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378 (1935); *LeTulle* v. *Scofield, supra.*

The problem of "continuity of interest" was considered by the Courts principally from the single aspect of what the old proprietors must receive in the new enterprise. But with the profusion of distress reorganizations engendered by the economic depression of the early 1930's it became necessary to explore another element of the problem, to wit, who are the old proprietors. The latter problem is the crucial one here.

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The problem of the identity of the old proprietors was first presented to the Supreme Court in a group of cases decided in 1942. *Helvering* v. *Alabama Asphaltic Limestone Company,* 315 U. S. 179; *Palm Springs Holding Corporation* v. *Commissioner,* 315 U. S. 185; *Bondholders Committee etc.* v. *Commissioner,* 315 U. S. 189; *Helvering* v. *Southwest Consolidated Corporation,* 315 U. S. 194. The first two of said cases are the significant ones here.

In the *Alabama* case the respondent acquired all the assets of an insolvent corporation pursuant to a creditors plan of reorganization consummated with the aid of the bankruptcy court. At the sale by the bankruptcy trustee

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[10] Receipt of preferred stock of the transferee corporation by the stockholders of the selling corporation has been held to represent a substantial continuation of their interest. *John A. Nelson Co.* v. *Helvering,* 296 U. S. 374 (1935).

the creditors committee was the successful bidder. The price was paid in substantial part by agreements of creditors to accept stock of a new corporation in full discharge of their claims and by an offer of the committee to meet the various costs of administration. Pursuant to the plan all the stock of the respondent was distributed among the creditors of the bankrupt company. The Government contended that the requisite continuity of interest was broken because the stockholders of the bankrupt corporation were eliminated by the plan (no portion whatever of their proprietary interest having been preserved for them in the new corporation) and hence there was "no reorganization." Recognizing that the old continuity of interest had been

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broken, the Court held that it was

> "immaterial that the bankruptcy sale shifted the ownership of the equity in the property from the stockholders to the creditors of the old corporation. Plainly, the old continuity of interest was broken. Technically that did not occur * * * until the judicial sale took place. For practical purposes, however, it took place not later than the time when the creditors took steps to enforce their demands against their insolvent debtor. In this case, that was the date of the institution of bankruptcy proceedings. From that time on they had effective command over the disposition of the property. The full priority rule of *Northern P. B. Co.* v. *Boyd,* 228 U. S. 482, applies to proceedings in bankruptcy as well as to equity receiverships. *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106. It gives creditors, whether secured or unsecured, the right to exclude stockholders entirely from the reorganization plan when the debtor is insolvent. See *In*

Re 620 Church Street Bldg. Corp., 229 U. S. 24. When the equity owners are excluded and the old creditors become the stockholders of the new corporation, it conforms to realities to date their equity ownership from the time when they invoked the processes of the law to enforce their rights of full priority. At that time they stepped into the shoes of the old stockholders. The sale 'did nothing but recognize officially what had before been true in fact.' *Helvering* v. *New Haven & S. L. R. Co.* (CCA 2d), 121 F. (2d) 985, 987."

The *Palm Springs* case was a companion one to the *Alabama* case and involved basically the same problem, although a different procedure was invoked to salvage the interest of the creditors. The decision in the *Alabama* case was held to be controlling. "The critical facts" held the Court "are that the old corporation was insolvent and that its creditors took effective steps to obtain command over its property. For the reasons stated in *Helvering* v.

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Alabama Asphaltic Limestone Co., supra, the creditors at that time acquired the equivalent of the proprietary interest of the old equity owner. Accordingly, the continuity of interest test is satisfied."

In the *Alabama* and *Palm Springs* cases, and those which followed them,[11] there arrived some point in time when it could be said that ownership of the corporation shifted

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[11] See, e.g., *Templeton's Jewelers, Inc.* v. *United States,* 126 F. 2d 251 (6th Cir., 1942); *Rotenberg* v. *Sheehan,* 48 F. Supp. 584 (E. D. Mo., 1943), appeal dismd., 144 F. 2d 992 (8th Cir. 1944); *Braicks* v. *Hendricksen,* 43 F. Supp. 254 (W. D. Wash., 1942), aff'd 137 F. 2d 632 (9th Cir. 1943); *Connohio, Inc.,* 9 T. C. M. 1105, 1950; *Peabody Hotel Company,* 7 T. C. 600 (1946). See also *Helvering* v. *Cement Investors, Inc.,* 316 U. S. 527 (1942).

to the creditors. Typically, the change of ownership takes the form of an assumption of control by a creditors committee, or by an indenture trustee acting for the benefit of bondholders after the formulation of a reorganization plan. The exercise by the creditors of their rights of priority, and of their right to take over the corporate assets to the exclusion of the stockholders, works a transfer of dominion which puts them in the place of the stockholders. When, following the bankruptcy or receiver's sale, the creditors take over the assets of the corporation and become the stockholders of the new corporation, they are merely continuing an equity relationship which had by then already existed.

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This rationale is consistent with the concept reflected on a corporate balance sheet and stems from the relationship between a corporation and its creditors. On one side of the balance sheet there is set forth the assets of the corporation and on the other, first the interests of the creditors—the liabilities, and then those of the equity owners—whatever remains after deducting the liabilities from the assets. This balance is the capital of the corporation. Those who deal with the corporation look to its capital funds as a source of and security for payment of the debts due them. If insolvency intervenes and the creditors take effective steps to enforce their demand via a foreclosure or bankruptcy or reorganization proceeding they step into the shoes of the stockholders *vis a vis* the interests or equity of the latter in the totality of rights and assets of the company.

No case has been cited by counsel and independent research by the Court has failed to find one dealing with the

status of a holder of receiver's certificates as a party to a reorganization. The dissimilarity between the origin and rights of the certificate holder and those of the corporate creditor make apparent that the reasons for relating creditors to stockholders are absent in the case of the former. The certificate holder did not deal with Shubert as such. The loan which is evidenced by the certificates was made to the receivers and not to Shubert. The rights

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of the certificate holder did not derive from Shubert and the ownership thereof carried with it no right to take any action against Shubert in the event the certificates remained unpaid. The receivers' certificates were not absolute promises to pay nor debts of Shubert. They were debts of the receivers in their official capacity backed by the pledged faith of the Court that the proceeds of the property on which they were a charge, to the extent they were sufficient for that purpose, would be applied to their payment. See Clark, Receivers §§459, 461 (2d ed. 1929).

Until the sale the receivers were, both in fact and in legal contemplation, attempting to rehabilitate Shubert for the benefit of its creditors existing at the time of the institution of the proceeding. In view of its insolvency only the creditors held the equity in Shubert during the receivership. Nor does the fact that the certificates were secured by a charge or a "lien" on the property of Shubert in the hands of the receivers add weight to the suggestion that the certificate holder possessed or exercised a proprietary interest. It was not such a lien as conferred powers of foreclosure or control. To say that the holders had a "lien" is to say only that they had a right to repayment out of whatever assets were available for that pur-

pose prior to the unsecured creditors of Shubert. Until there is a default, a creditor's interest is not the equivalent of a proprietary interest notwithstanding that upon default the creditor may also enforce a lien upon specific property. True, insolvency of the debtor operates as an anticipatory breach of an executory agreement (*Rohem* v. *Horst,* 178 U. S. 1 (1900); *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581 (1916)) but here the certificate holder well knew it was making a loan to an insolvent estate in receivership. No term may be implied therefore, that the borrower would not permit itself through insolvency to become disabled from meeting its engagement. Absent such term, expressed or implied, the doctrine of anticipatory breach may not be invoked. Here the receivers' certificates were not due when the Special Master's sale was scheduled to be held. As already indicated Lee Shubert individually committed himself to bid an amount sufficient to discharge in full the receivers' certificates with interest—an undertaking which the certificate holder was content to accept. Under the circumstances its interests could in no wise be affected by Shubert's insolvency.[12] Payment in full when due with interest having been satisfactorily provided for, the rights of the certificate holder were akin to those of a creditor of a solvent debtor. The best that can be urged (without intimating, however, that such a contention is sound) is that the certificate holder had a mere possibility of a proprietary interest but that, as the Court said in the

[12] "A plan does not 'affect' the claims of creditors when they retain exactly what they had before." *Gross* v. *Bush Terminal Co.,* 105 F. 2d 930, 932 (2d Cir., 1939).

Alabama case, "is, of course, not its equivalent." Taking full account of the steps involved in the issuance of the certificates, the rights which they conferred and the use to which they were put to acquire the Shubert assets, there was no point in time prior to the receiver's sale when it can be said that plaintiff, as the holder of the certificates, had the right to or took effective command of the Shubert assets.

Plaintiff's brief argues that there is "no substantial difference whatever" between the instant case and *Minneapolis, Northfield & Southern Railway* v. *Klem,* 117 F. Supp. 325 (D. Minn. 1953), aff'd 225 F. 2d 909 (8th Cir. 1955). In that case, a sufficient continuity of interest was found to exist despite changes in the ownership of creditors' claims during the pendency of the proceeding. As assignees, the new holders of the claims were held to be clothed with the same creditors rights and powers as had inured to their assignors. The new holders of the claims which antedated the commencement of the proceeding, were not divested of their right to reorganize the company merely because they became owners during the pendency of the proceeding. The *Minneapolis* case is similar to the case at bar in that the assignees of the creditors' claims, like the holder of the receivers' certificates, acquired their respective rights after the institution of the proceedings. Here, however, the similarity ends. In the case at bar, with respect to plaintiff's assignor—the original holder of the receivers' certificates—continuity of interest was lacking; in *Minneapolis* with respect to the assignors—creditors whose claims arose out of dealings with the corpora-

tion prior to the institution of the proceeding—continuity of interest existed.

The facts are, of course, that as matters eventuated, there were no bidders at the Special Master's sale for the assets in separate parcels, they were struck down in bulk, the successful bidder was the holder of the receivers' certificates, the same were applied on account of the purchase price, and the purchaser has continued the business enterprise. The circumstance that at or about the time of the sale plaintiff acquired the receivers' certificates and obtained permission to apply them on account of the purchase price did not alter its status as a cash purchaser nor confer benefits upon it different than those that would inure to any cash purchaser. Indeed, its bid was for a fixed sum payable in cash and but for its application for leave to pay part of the purchase price by surrendering the certificates, they would have been fully discharged by payment in cash.

Before the Special Master's sale the certificate holder had no rights to the ownership of the assets in the hands of the receiver. Whatever rights of ownership it ultimately acquired stemmed from, and did not pre-date, the sale. The continuity of interest, therefore, was broken and no reorganization occurred.

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This leaves for consideration plaintiff's alternate position that if it is not entitled to include in its equity invested capital Shubert's basis of the assets it purchased at the Special Master's sale, it is entitled to include the basis of the stock, debentures and unsecured claims of Shubert in the hands of those who accepted the offer contained in the Lee Shubert letter discussed *supra*. Reliance for this alternate position is placed on §113(a)(8)(B) of the In-

ternal Revenue Code.[13] This position is clearly untenable: (1) Plaintiff acquired no property from the old stockholders and creditors who accepted Lee Shubert's offer. The offer was wholly gratuitous, was made by Lee Shubert individually, not by the plaintiff, and was made after the acquisition of the assets. Under the terms of the letter those who accepted the offer transferred no property to anybody, certainly not to the plaintiff. "Security holders and creditors of Shubert Theatre Corporation," wrote Lee Shubert "availing themselves of the offer should forward their certificates or allowed claims to *me* * * * . *I* will not

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take title to the securities so forwarded, but, acting as agent for the *holders* thereof, will surrender them to Shubert Theatre Corporation for cancellation." If any contribution was made by the old stockholders and creditors —and none could have been made since after the sale the old stock and the claims of creditors were valueless—it was made to Lee Shubert, not to the plaintiff. But there was no intention to pay in surplus or make a contribution to the capital of either Shubert or plaintiff—witness the following from Lee Shubert's letter "The debentures and allowed claims wil not be canceled until it is definitely

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[13] "Sec. 113 * * * (a) BASIS (UNADJUSTED) OF PROPERTY.—The basis of property shall be the cost of such property; except that—

(8) PROPERTY ACQUIRED BY ISSUANCE OF STOCK OR AS PAID-IN-SURPLUS.—If the property was acquired after December 31, 1920, by a corporation—* * *

(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made."

known whether or not there will be anything available for distribution to the holders thereof. If anything should be available, I will collect the amount due upon the debentures and allowed claims surrendered by those who have accepted my offer, and will turn over to them the amounts which they are respectively entitled to, less expenses incurred by me in that connection," and his earlier statements in said letter "I have arranged for the issuance of common stock of Select Theatres Corporation to security holders and creditors of Shubert Theatre Corporation, without cost to them. This stock * * * would otherwise become part of my personal holdings. * * * " (2) Plaintiff did not issue any stock to the old stockholders and creditors who accepted Lee Shubert's offer. The stock which was delivered to them had been subscribed to and fully paid for by Atel which was entitled to have the same issued to it

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or its nominees. In delivering the stock, it was acting pursuant to the instructions of and as agent for Atel. The delivered stock was stock *of* the plaintiff, but not *its* stock. The facts here are wholly without the provisions of section 113.

Plaintiff suggests that Lee Shubert's offer to distribute stock which otherwise would be part of his personal holdings was not wholly gratuitous, but was made to avert possible claims of creditors under the "absolute priority" rule of *Northern Pacific R. Co.* v. *Boyd,* 228 U. S. 482 (1913). Assuming, without deciding the question, that the offer was prompted by such a motive, it still does not follow that an after-thought may rise to the dignity of a pre-conceived plan of reorganization or justify invoking section 113 of the Internal Revenue Code. An attempt to

forestall claims and to provide insulation to the stockholders of the new corporation from suit by giving the Shubert creditors a minor interest in the new corporation is not tantamount either to a reorganization or the acquisition of property by the new corporation by issuance of stock or as paid in surplus or as a contribution to capital. The requisite continuity of interest must flow from rights recognized in a plan, otherwise the continuity is broken. Its existence must be determined by reference to facts as they occurred and not legal rights which might have been, but were not, asserted. (Cf. *Templeton's Jewelers, Inc.* v. *United States,* note (11) *supra.*)

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Plaintiff acquired the Shubert assets by purchase and not in furtherance of a tax-free reorganization. The basis it ascribed thereto in its tax return as filed was correct and the claim for refund is denied.

The foregoing shall constitute Findings of Fact and Conclusions of Law in accordance with Fed. R. Civ. P. 52(a). Dated: September 29, 1956.

ALEXANDER BICKS
United States District Judge.

10/1/56
Judgment Entered

HERBERT A. CHARLSON
Clerk

10/22/56—Costs taxed on the sum of $20.00.

HERBERT A. CHARLSON
Clerk

Per Curiam Opinion of the U. S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 19—October Term, 1957.

(Argued November 12, 1957 Decided December 3, 1957.)

Docket No. 24447

SELECT THEATRES CORPORATION,

Plaintiff-Appellant,

—v.—

JAMES W. JOHNSON, Collector of Internal Revenue,

Defendant-Appellee.

Before:

CLARK, *Chief Judge,*
MOORE, *Circuit Judge,* and LEIBELL, *District Judge.*

Appeal from the United States District Court for the Southern District of New York, Alexander Bicks, *Judge.*

Plaintiff, Select Theatres Corporation, appeals from a judgment in favor of defendant, James W. Johnson, Collector of Internal Revenue, in an action for the recovery of federal income and excess profits taxes paid by plaintiff. Affirmed.

Per Curiam Opinion of the U. S. Court of Appeals

VICTOR R. WOLDER, New York City, *for plaintiff-appellant.*

MORTON S. ROBSON, Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for defendant-appellee.*

PER CURIAM:

Judgment affirmed on the opinion of District Judge Bicks, D. C. S. D. N. Y., 145 F. Supp. 583.